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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to give Grove's proposed instruction on voluntary intoxication.
2. The trial court erred in allowing Grove to be represented by counsel who provided ineffective assistance in failing to propose instruction on voluntary intoxication for Count II.
3. The trial court erred in failing to take the case from the jury for lack of sufficient evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether it was reversible error for the trial court to fail to give Grove's proposed instruction on voluntary intoxication? [Assignment of Error No. 1].
2. Whether the trial court erred in allowing Grove to be represented by counsel who provided ineffective assistance in failing to propose instruction on voluntary intoxication for Count II? [Assignment of Error No. 3].
3. Whether there was sufficient evidence to find Grove guilty of theft in the second degree (Count I) and bail jumping (Count II) beyond a reasonable doubt? [Assignment of Error No. 3].

C. STATEMENT OF THE CASE

1. Procedure

Jim G. Grove (Grove) was charged by first amended information filed in Thurston County Superior Court with one count of theft in the second degree (Count I) and one count of bail jumping (Count II). [CP 9].

Prior to trial, no motions regarding CrR 3.5 or CrR 3.6 were made or heard. Grove was tried by a jury, the Honorable Gary R. Tabor

presiding. Grove objected and took exception to the court's failure to give his proposed instruction on voluntary intoxication. [CP 11-13; RP 131-135]. The jury found Grove guilty as charged on both counts. [CP 16, 17; RP 183-190].

The court sentenced Grove to a standard range sentence of 3-months on Count I, and to a standard range sentence of 3-months on Count II based on an undisputed offender score of 1 (the sole point for each count being the other current offense) with both sentences running concurrently for a total sentence of 3-months to be served on electronic home monitoring. [CP 18-31, 32, 33, 34, 35-42; 5-1-08 RP 14-21].

A notice of appeal was timely filed on May 1, 2008. [CP 43-51]. This appeal follows.

2. Facts

On May 6, 2007, Sandra Armstrong was at the Red Wind Casino celebrating her birthday by playing the slot machines. [RP 8-9]. At some point in the evening, she ran out of money and went to a nearby ATM to get \$500 in cash. [RP 9-11]. Not wanting to lose her slot machine she moved between the slot machine and the ATM waiting for the money to come out of the ATM machine. [RP 9-11]. As she was returning to the ATM machine, she noticed a man with a "Santa Claus" profile step away from the ATM and found only a receipt for a \$500 withdrawal but no

money at the ATM machine. [RP 11-16]. Armstrong admitted that she didn't see the man take the money, but she just knew "what's happening." [RP 12, 17-18, 20]. Armstrong immediately contacted security. [RP 13-15]. Security upon review of the casino's surveillance tape, which was played for the jury, contacted Grove shortly thereafter and Grove denied stealing Armstrong's money. [RP 25-43]. Grove had \$154 on his person when he was eventually searched. [RP 54-56].

Linda Myhre Enlow, a clerk with the Thurston County Superior Court, testified regarding the authenticity of documents in the Grove case, specifically that he had been charged, released on bail, and was required to appear at a hearing on January 23, 2008, for which he had signed an acknowledgement requiring his person appearance and had failed to do so with the result that a bench warrant had been issued. [Supp. CP Exhibits Nos. 4-12; CP 3, 14-15; RP 65-81].

Grove testified in his own defense. He admitted that he had taken \$500 from the ATM machine, but denied that he had any intent to deprive Armstrong of the money because he intended to turn the money in to casino for return to its true owner—he was contacted by casino security before he could do so. [RP 101-106]. Grove also testified that he was on medication that affected his ability to think and act clearly. [RP 99-101]. Grove also explained his non-appearance at the January 23<sup>rd</sup> hearing as

being caused by his grave health situation and the fact that he was taking a number of medications that affected him to such an extent that he was unaware of his required appearance. [RP 106-110].

D. ARGUMENT

(1) IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO FAIL TO GIVE GROVE'S PROPOSED INSTRUCTION ON VOLUNTARY INTOXICATION.

Under the Sixth Amendment to the United States Constitution and Art. 1 sec. 22 (amend. 10) of the Washington Constitution, a criminal defendant has the right to present all admissible evidence in his or her defense. State v. Clark, 78 Wn. App. 471, 999 P.2d 964 (1995); State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996). Evidence is admissible when relevant, provided other rules do not preclude its admission. State v. Clark, 78 Wn. App. at 477; ER 401, 402; *see also* State v. Austin, 59 Wn. App. 186, 194-195, 796 P.2d 746 (1990).

A party is entitled to have the court instruct the jury on its theory of the case if evidence exists in the record to support the theory. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). A defendant is entitled to have his or her theory of the case submitted to the jury under the appropriate instructions when the theory is supported by substantial evidence. State v. Finley, 97 Wn. App. 129, 134, 982 P.2d 681, *review denied*, 139 Wn.2d 1027 (2000) (*citing* State v. Washington, 36 Wn. App.

792, 793, 677 P.2d 786, *review denied*, 101 Wn.2d 1015 (1984)). “[I]n evaluating the adequacy of the evidence [to support the proposed instruction], the court cannot weigh the evidence.” State v. Williams, 93 Wn. App. 340, 348, 968 P.2d 26 (1998), *review denied*, 138 Wn.2d 1002, 984 P.2d 1034 (1999). State v. Fernandez-Medina, 141 Wn.2d 448, 460-61, 6 P.3d 1150 (2000). An appellate court will review a trial court’s decision to reject a jury instruction for an abuse of discretion. State v. Hall, 104 Wn. App. 56, 60, 14 P.3d 884 (2000) (*citing State v. Picard*, 90 Wn. App. 890, 902, 954 P.2d 336, *review denied*, 136 Wn.2d 1021 (1998)).

To support a voluntary intoxication instruction, the defendant must show (1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of intoxication, and (3) evidence that the intoxication affected the defendant’s ability to acquire the required mental state. State v. Gabryschak, 83 Wn. App. 249, 252, 921 P.2d 549 (1996) (*citing State v. Gallegos*, 65 Wn. App. 230, 238, 828 P.2d 37, *review denied*, 119 Wn.2d 1024 (1992)). What is relevant is the degree of intoxication and the effect it had on the defendant’s ability to formulate the requisite mental state. State v. Priest, 100 Wn. App. 451, 455, 997 P.3d 452 (2000). In order to satisfy the first part of this test, the

“particular mental state” may include knowingly. *See State v. Finley*, 97 Wn. App. at 135.

Here, Grove satisfied the three-prong test in order for a voluntary intoxication instruction to be given. First, the crime charged (theft in the second degree—Count I) has the particular mental element of intent to deprive a person of property. Second, there was substantial evidence of Grove’s intoxication—Grove testified that he had taken a number of medications on the evening in question. And finally, Grove testified that the medications resulted in him not thinking clearly (affected his ability to form the requisite mental state) as demonstrated by the fact that he believed he was at the casino with his significant other who in fact was not present. Given Grove’s testimony, he was entitled to a voluntary intoxication instruction.

Grove proposed just such an instruction which stated:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant act with intent.

[CP 11-13]. The State objected to the giving of this instruction and the court refused to give it. [RP 131-135]. In doing so the court improperly weighed the evidence and determined that:

...it (intoxication) did cause some issues that he described as making him think something that wasn’t true, he did testify from

the stand that he was able to intend and that he had an intent and his intent, according to his testimony, was to give the money back to the person who had lost the money. The jury can believe or disbelieve that testimony. They can decide whether or not there was an intent to wrongfully obtain or exert unauthorized control over the property. That's a question for the jury based on the facts. I think that either counsel can argue their theory of the case. Voluntary intoxication in this particular situation is not supported by the evidence, so I'm going to withdraw [the instruction]....

[RP 134-135].

The court's ruling acknowledges that there was substantial evidence of intoxication, which satisfies Grove's burden in this regard. But of more importance, court's ruling establishes reversible error in that the court improperly weighed the evidence and usurped the role of the jury when it denied Grove an instruction on voluntary intoxication. *See State v. Fernandez-Medina, supra*. The sole role for the court in determining whether to give a voluntary intoxication instruction was to determine if Grove had satisfied the three-prong set forth above; he did, and the court should have given the instruction. This court should reverse and dismiss Grove's conviction for theft in the second degree.

(2) GROVE WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO PROPOSE AN INSTRUCTION OF VOLUNTARY INTOXICATION ON COUNT II—BAIL JUMPING.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the

representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Grove's counsel failed to propose an instruction on voluntary intoxication for Count II—bail jumping. As argued above, the three-prong test for such an instruction is equally applicable to Count II. Bail jumping has a requisite mental element of knowledge; Grove testified that he was taking a significant amount of medication because of his dire health situation; and that medication affected his mental state—he did not know he was required to make an appearance before the court. Based on Grove's testimony his counsel should have also proposed an instruction on voluntary intoxication to the charge of bail jumping and his failure to do

so satisfies both prongs of ineffective assistance of counsel. For the reasons set forth herein, the record does not reveal any tactical or strategic reason why trial counsel would have failed to propose such an instruction, and had counsel done so, the trial court should have given the instruction.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is apparent as argued above—but for counsel's failure to propose a voluntary intoxication instruction on Count II Grove was deprived a defense to the charge and the jury would have been better able to assess the evidence.

- (3) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT GROVE WAS GUILTY OF THEFT IN THE SECOND DEGREE (COUNT I) AND BAIL JUMPING (COUNT II).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S.

Ct, 2781 (1979). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

With regard to Count I, Grove was charged and convicted of theft in the second degree. An essential element, which the State bore the burden of proving beyond a reasonable doubt, is that Grove intended to deprive Armstrong of her property (\$500). [RP 145-146; Court’s Instruction to the Jury No. 8]. The sum of the State’s evidence on this element was the mere fact that Armstrong’s \$500 was taken, which Grove admitted to taking in his testimony. However, Grove testified that his intent was to return the money. He was contacted by the casino security before he could do so. The State has failed to establish beyond a reasonable doubt Grove’s guilt of theft in the second degree. This court should reverse Grove’s conviction in Count I.

With regard to Count II, Grove was charged and convicted of bail jumping. An essential element, which the State is required to prove beyond a reasonable doubt, is that the person charged with bail jumping “knowingly” failed to make a required court appearance. The State’s burden on this element does not require that the State prove beyond a reasonable doubt that “on the precise date of the scheduled hearing” the defendant knew he was required to appear. State v. Ball, 97 Wn. App. 534, 536-537, 987 P.2d 632 (1999), *see also* Court’s Instruction to the Jury No. 13 [CP 147]. The State must prove beyond a reasonable doubt that the person was aware of/knew of the date and duty to appear.

The sum of the State’s evidence to prove this essential element consisted of Exhibits Nos. 4-12. [Supp. CP Exhibits Nos. 4-12; RP 65-81]. However, Grove testified in his own defense that he did not know of his duty to appear on January 23<sup>rd</sup> attributable to his health situation and the medication he was taking. The State has failed to elicit sufficient evidence to prove beyond a reasonable doubt that Grove was guilty of bail jumping (Count II). This court should reverse his conviction.

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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

E. CONCLUSION

Based on the above, Grove respectfully requests this court to reverse and dismiss his convictions.

DATED this 29<sup>th</sup> day of September 2008.

Patricia A. Pethick  
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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 29<sup>th</sup> day of September 2008, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 29<sup>th</sup> day of September 2008.

Patricia A. Pethick  
Patricia A. Pethick